

Title 38 Decision Paper
Department of Veterans Affairs (VA)

FACTS

The Department of Veterans Affairs (VA) is comprised of three administrations: Veterans Health Administration (VHA); Veterans Benefits Administration (VBA); and the National Cemetery Administration (NCA). (Attachment A). VA is the second largest Federal Department and has a workforce of approximately 351,540 full-time employees. *Id.* At present, the VA employs approximately 108,606 Title 38 personnel appointed under described in 38 U.S.C. § 7401(1).¹ (Attachment B). VHA is America's largest integrated health care system, providing care at 1,255 health care facilities, including 170 medical centers and 1,074 outpatient sites of care of varying complexity (VHA outpatient clinics), serving 9 million enrolled Veterans each year. (Attachment C).

On March 15, 2011, a Master Collective Bargaining Agreement (2011 VA-AFGE Master Agreement) by and between the American Federation of Government Employees/National Veterans Council (Union or AFGE), and the VA was approved, signed, and effectuated. (Attachment D). The 2011 VA-AFGE Master Agreement includes Article 60, *Title 38 Representation at Boards or Hearings*. (Attachment E).

On May 21, 2018, the Office of Labor Management Relations (LMR) issued a notice to the Union repudiating Article 60, *Title 38 Representation at Boards or Hearings*, of the 2011 VA-AFGE Master Agreement because "the Article is non-negotiable under 38 U.S.C. 7422 (b)(c) and (d) of the Statute. Hence, the Article is null, void and unenforceable. Effective immediately, the Department will no longer comply with this non-negotiable contractual requirement." (Attachment F).

On May 23, 2018, the Union filed a demand to bargain. (Attachment G).

On May 24, 2018, LMR sent a notice to the Union advising the matter was non-negotiable for the same reasons listed in the repudiation notice. (Attachment H).

On May 30, 2018, LMR issued a clarification notice regarding an employee's entitlement to a representative of their choice as listed in 38 U.S.C. § 7462 and provide a reference to VA Handbook for recording the time as it relates to representatives who also happen to be union officials. (Attachment I).

¹ The employees described in 38 U.S.C. § 7421(b), Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-duty dental auxiliaries, and Chiropractors, are appointed under 38 U.S.C. § 7401(1).

On June 20, 2018, the Union filed a national grievance against the Department of Veterans Affairs for illegal repudiation of Article 60. (Attachment J). In its grievance, the Union alleged that the Secretary must issue a 38 U.S.C. § 7422 determination concerning Article 60 before the Agency declared a matter to be non-negotiable. *Id.* In addition, the Union contended that the Agency violated 38 U.S.C. § 7462(b), the Administrative Procedures Act (APA), and the Federal Sector Labor Management Relations Statute (FSLMRS). *Id.*

On August 6, 2018, LMR provided a response denying the Union's grievance and asserting the grievance was excluded from collective bargaining pursuant to 38 U.S.C. § 7422 (b), (c), and (d). (Attachment K). LMR's response noted that this was consistent with previous decisions made by the Secretary pursuant to 38 U.S.C. § 7422(d) and that Federal Labor Relations Authority (FLRA) caselaw clearly allows an agency under the FSLMRS to declare existing contract clauses nonnegotiable. *Id.*

On August 10, 2018, the Union invoked arbitration. (Attachment L).

On February 1, 2019, LMR provided notice to the Union that the Secretary would make a determination pursuant to 38 U.S.C. § 7422(d) on whether the matters were concerning or arising out of professional conduct or competence and peer review, and thus, excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b). (Attachment M). The Union was given an opportunity to provide input on the matter to the Secretary, through LMR, within 10 working days of the notice. *Id.*

On March 1, 2019, the Union submitted its response to LMR's notice. (Attachment N). The Union asserted that: 1) Article 60, ¶ A, only restates an employee's preexisting right to be represented before Disciplinary Appeals Boards (DABs) and Summary Review Boards (SRBs); 2) repudiating Article 60, ¶ B, harms accountability; 3) Article 60 has existed for 22 years without interfering with VA's rights as to matters of professional conduct or competence, peer review, or employee compensation; and, 4) the 38 U.S.C. § 7422 request in this issue regarding a repudiation of an article improperly departed from the VA's case by case approach; and, 5) the procedural questions addressed in Article 60 do not substantively impact the exceptions to collective bargaining in 38 U.S.C. § 7422(b). *Id.*

AUTHORITY

The VA Secretary has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or

clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

Whether Article 60 - *Title 38 Representation at Boards or Hearings*, of the 2011 VA-AFGE Master Agreement, is a matter or question concerning or arising out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b), and thus is excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a) and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b), (d). "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Article 60, *Title 38 Representation at Boards or Hearings*, of the 2011 VA-AFGE Master Agreement states:

A. The Union will be allowed to represent any unit employee at any hearing before a Title 38 Disciplinary Board or whenever a probationary employee appears before a Professional Standards Board in a termination proceeding. A representative in a Professional Standards Board hearing may do those things an employee is entitled to do under regulations.

B. If the employee does not choose to have Union representation, the Union may be permitted to have an observer present at hearings described in Paragraph A. The Union observer may attend the Professional Standards Board hearing only during the employee's presentation. Consistent with applicable laws and regulations, Union representatives and observers must protect the confidentiality of any information to which they have access in connection with a Board Hearing. (Attachment E).

Article 60 impacts two VA procedures - Professional Standards Boards' (PSB) summary reviews of probationary employees and DABs.

Summary Reviews by PSBs

PSBs, among other functions, conduct probationary reviews for medical care providers, including the employees described in 38 U.S.C. § 7421(b). (Attachment O, VA Handbook 5005, Part II, Ch. 3, § C, ¶¶ 1(a); 5(c)). PSBs conduct summary reviews of probationary employees' work records where "summary separation from Federal Service may be justified" during the probationary period. (Attachment P, VA Handbook 5021, Part III, Ch. 1, ¶¶ 2(f); 3(a-b)). Determinations regarding whether a summary review is needed are made by management. *Id.* at ¶ 3(a). Once the summary review is complete, the PSB submits its findings and recommendations as to whether the employee should be retained or separated to the appropriate officials. *Id.* at ¶ 3(g-h). VA Handbook 5021 notes that "[s]ummary reviews deal with issues related to professional competence or conduct and peer review." *Id.* at ¶ 3(d)(5). VA Handbook 5021 further states that employees undergoing summary review had the right to:

Be represented by an individual of the employee's choice, provided the choice would not create a conflict of interest. A summary review is not an adversarial procedure. The representative's role is limited to assisting the employee in exercising the right to reply orally and/or in writing to the reasons for the review. Any responses to requests for information by the Board during the review process are considered part of the employee's reply. Accordingly, the employee's representative may assist in such matters. **NOTE:** *Because summary reviews deal with issues related to professional competence or conduct and peer review, a union representative is not entitled to be present at a summary review except when serving as the employee's personal representative.*

Id. at ¶ 3(d)(5).

PSBs "act for, are responsible to, and are agents of, the Under Secretary for Health," and "VHA management officials are responsible for ensuring the effective functioning of boards;" thereby making them integral in management's decision-making process. (Attachment O, VA Handbook 5005, Part II, Ch. 3, § C, ¶ 1(a), (d)). Whenever possible, PSBs are composed of "three to five employees from the same occupation as the individual being considered." *Id.* at ¶ 4.

Disciplinary Appeals Boards

DABs are a panel appointed by the Under Secretary for Health and designated to hear a full-time permanent employee's appeal of a major adverse action which is based in

whole or in part on a question of professional conduct or competence. (Attachment Q, VA Handbook 5021, Part V, Ch. 1, ¶ 1). Major adverse actions are suspensions, transfers, reductions in grade, reductions in basic pay (including reductions in market pay for physicians and dentists resulting from involuntary reassignments or changes in assignments when taken for conduct and performance reasons) and discharges. *Id.* at ¶ 1. DABs consist of three VA employees, at the same grade or higher than the appealing employee, at least two of whom are employed in the same category or position as the appealing employee. *Id.* at ¶ 4(a). DABs only hear appeals from the employees described in 38 U.S.C. § 7421(b). *Id.* at ¶ 1.

VA Handbook 5021 notes, "The employee may be represented by an attorney or other person of the employee's choice." (Attachment Q, VA Handbook 5021, Part V, Ch. 1, ¶ 3(c)). After making findings, the DAB submits a recommendation to the Deputy Under Secretary for Health, who can accept, reverse, or vacate and remand the DAB's decision, subject to the limitations in VA Handbook 5021. *Id.* At ¶ 9(c-f). For the employees described in 38 U.S.C. § 7421(b) (i.e., physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, expanded-duty dental auxiliaries, and chiropractors), 38 U.S.C. § 7422(b) specifically prohibits collective bargaining over matters that concern or arise out of such employees' professional conduct or competence and peer review.

Peer Review

On its face, it is evident that both DABs and PSBs are peer review proceedings. As noted above, both Boards are comprised of fellow VA employees mainly from the same occupation who review the medical care provided by 38 U.S.C. § 7421(b) employees. (Attachment O, VA Handbook 5005, Part II, Ch. 3, § C, ¶ 4; Attachment P, VA Handbook 5021, Part III, Ch. 1, ¶¶ 2(f); 3(a-b); Attachment Q, VA Handbook 5021, Part V, Ch. 1, ¶¶ 1, 4(a)). VA Handbook 5021 explicitly states that summary reviews by PSBs are peer review issues. (Attachment P, VA Handbook 5021, Part III, Ch. 1, ¶ 3(d)(5)). There are no relevant differences between PSBs, which engage in peer review to assess whether a probationary employee should be terminated, and DABs, which engage in peer review regarding disciplinary actions based on patient care issues, sufficient to justify differing treatment under 38 U.S.C. § 7422(b).

The Secretary has previously found that matters pertaining to PSB procedures, specifically the right to union representation, are questions related to or arising out of peer reviews. In VAMC Hampton, the Union sought the right to represent witnesses, other than the subject employee, appearing before a PSB summary review proceeding. (Attachment R, VAMC Hampton (July 15, 2011)). Ultimately, the VA Secretary

concluded that the matter involved "peer review within the meaning of 38 U.S.C. § 7422(b)." *Id.* Additionally, in an earlier case at VAMC Hampton, the Union wanted to participate as an observer during PSB meetings but the Under Secretary for Health decided that "[e]xtending the union's rights to attend [PSB] meetings beyond those specifically provided for in VA policies and the Master Agreement.....is clearly a matter that 'concerns, or arises out of peer review,' and thus is not subject to collective bargaining or grievances procedures thereunder." (Attachment S, VAMC Hampton (May 7, 2001)), see also Attachment T, VAMC Leavenworth (November 24, 1992) (no right to representation at PSB because it was a peer review issue); Attachment, U VAMC Washington, DC (June 3, 2014) ("PSBs by, definition, are engaged in peer review," including when conducting credentialing and clinical performance reviews)).

The Federal Labor Relations Authority (FLRA) has also repeatedly upheld VA management's unfettered discretion related PSBs, given their inherent peer review function. The FLRA has ruled that there was no right to union representation during PSB proceedings, because the VA "is authorized to prescribe regulations governing, among other things, probationary peer review proceedings for nonhybrid employees without regard to the bargaining and representational rights and obligations...." Dep't of Veterans Affairs Med. Ctr. Jackson, Miss. & Nat'l Fed'n Fed. Employees, 49 F.L.R.A. 171, 175 (Feb. 28, 1994) *reconsideration denied*, 49 F.L.R.A. 701 (Apr. 8, 1994); see also Dep't of Veterans Affairs Med. Ctr., Leavenworth, Kan. & Nat'l Fed'n Fed. Employees, 49 F.L.R.A. 1624, 1627-1628 (Jul. 21, 1994) (holding "the Department was free to promulgate regulations precluding union representation at [a PSB] peer review hearings."). These FLRA findings were validated by the D.C. Circuit. Nat'l Fed'n Fed. Employees, Local 589 v. Fed. Labor Relations Auth., 73 F. 3d 390, 393-394 (D.C. Cir. 1996) ("[W]e agree with the FLRA's view that the Secretary exercises complete discretion over peer review procedures....").

As the Secretary noted in VA Northern California Health Care System, these FLRA cases found that "when the Secretary issues policies that limit Union representation in procedures involving Title 38 employee, those policies override representational rights afforded to employees. (Attachment V, VA Northern California Health Care System (May 11, 2015) *citing* Dep't of Veterans Affairs Med. Ctr. Jackson, Miss. & Nat'l Fed'n Fed. Employees, 49 F.L.R.A. 171 (Feb. 28, 1994)). Here, VA has issued such policies: for PSB summary reviews, VA Handbook 5021 explicitly notes there is no right to union representation; and for DABs, VA Handbook 5021 only provides for personal representation, without providing for union representation. (Attachment P, VA Handbook 5021, Part III, Ch. 1, ¶ 3(d)(5); Attachment Q, VA Handbook 5021, Part V, Ch. 1, ¶ 3(c)).

The language in Article 60 of the 2011 VA-AFGE Master Agreement regarding representational rights is directly addressed in the FLRA cases above. It is evident that

this language infringes on management's unfettered right to determine peer review procedures for employees described in 38 U.S.C. § 7421(b) pursuant to 38 U.S.C. § 7422(b). Further, the Articles' statement regarding allowing union observation also directly involves the procedures of these peer review processes and is non-negotiable under 38 U.S.C. § 7422(b)(2).

Professional Conduct or Competence

In addition to being inherently peer review processes, PSBs and DABs also address issues that concern or arise out of matters of professional conduct and competence as described in 38 U.S.C. § 7422(b) and defined in 38 U.S.C. § 7422(c). As noted above, PSBs are charged with reviewing probationary employee's performance. (Attachment O, VA Handbook 5005, Part II, Ch. 3, § C, ¶ 5). These matters are inherently connected with the professional competence of VA medical providers. In VAMC Leavenworth, the VA Secretary's finding that the Union did not have representational rights at a PSB was also based on a finding that it "concerns a matter or question arising out of professional competence." (Attachment T, (VAMC Leavenworth (November 24, 1992)). In VAMC Washington, DC, the Secretary found that performance reviews conducted by a PSB are "peer review processes or alternatively, involve assessments of the professional conduct or competence of a title 38 health care professional." (Attachment U, (VAMC Washington, DC (June 3, 2014) ("the clinical review of a title 38 employee's performance, including review by a facility's PSB falls within 38 U.S.C. § 7422's peer review or professional conduct or competence exclusions)).

Similarly, and by definition, DABs only deal with issues involving professional conduct or competence, which is defined the same as in 38 U.S.C. § 7422(c), matters which involve direct patient care and/or clinical competence. (38 U.S.C. § 7461(c)(3); Attachment Q, VA Handbook 5021, Part V, Ch. 1, ¶ 1). In VAMC Tomah, the Secretary determined that where the charges that form the basis of a disciplinary decision concern direct patient care and clinical competence, they are excluded from the grievance procedure as issues of professional conduct or competence. (Attachment W, (VAMC Tomah (Jun. 17, 2016); see also Attachment X, Southern Arizona VAHCS (Aug. 29, 2013)("the grievance challenging the validity of the suspension...concerns professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thereby excluded from collective bargaining.")). Notably, disciplinary matters involving professional care and competence are under the "exclusive jurisdiction" of DABs, which further illustrates that DABs are not subject to collective bargaining or grievance procedures. 38 U.S.C. § 7462(a). For these reasons, the peer review function of DABs and PSBs is intertwined with VA medical professionals' professional conduct or competence.

In its input, the Union asserted that Article 60, Paragraph A, only restates an employee's preexisting right to be represented before DABs and SRBs. However, the Article actually pertains to the rights of the Union. The Article begins, "[t]he *Union will be allowed* to represent any unit employee..." (Attachment N, emphasis added). While there are employee rights to representation before DABs and SRBs, this provision in Article 60 speaks to the Union's rights and not the employee. As Paragraph A refers to the rights of the Union, it should be excluded from the Agreement since it concerns or arises out of matters of professional conduct or competence and peer review. The Union also asserts that VA's repudiation of Article 60(B) increases secrecy at the expense of transparency and accountability. This provision permits the Union to observe hearings, regardless of whether a bargaining unit employee has elected to be represented by the Union. This Paragraph also creates a Union right in a matter of professional conduct or competence and peer review. If a bargaining unit employee chooses not to permit the Union to represent them in their peer review hearing on their professional conduct or competence, the Union lacks the right to be present at the hearing. As Paragraph B again refers to the rights of the Union, it should be excluded from the Agreement since it concerns or arises out of matters of professional conduct or competence and peer review.

The Union also contends that Article 60 survived Agency head review of the contract pursuant to 5 U.S.C. § 7114(c)(2) and has existed for 22 years without interfering with VA's rights as to matters of professional conduct or competence, peer review, or employee compensation. The Agency head review by previous administrations do not bind the Agency from asserting its statutory rights. The Union similarly argues that the Agency had not sought a decision pursuant to 38 U.S.C. § 7422(b) prior to this, despite given a few prior opportunities. Again, the actions or inactions of previous administrations do not bind the Agency from seeking and issuing a decision pursuant to 38 U.S.C. § 7422 regarding Article 60. Lastly, the Union asserts that the procedural questions addressed in Article 60 do not substantively impact the exceptions to collective bargaining in 38 U.S.C. § 7422(b). Article 60 provides the Union with rights over matters of professional conduct or competence and peer review as described in 38 U.S.C. § 7422(b). Under 38 U.S.C. § 7422, collective bargaining over such matters is prohibited.

Like the decisions described above, Article 60, *Title 38 Representation at Boards or Hearings*, in the 2011 VA-AFGE Master Agreement addresses peer review procedures for, and the substantive review of the professional conduct and competence of, employees described in 38 U.S.C. § 7421(b). Consequently, the Article is outside the

scope of 38 U.S.C. § 7421(b) employees' collective bargaining rights pursuant to 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

Article 60, *Title 38 Representation at Boards or Hearings*, of the 2011 VA-AFGE Master Agreement concerns or arises out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

RW

Approved

Disapproved

Robert L. Wilkie

Robert L. Wilkie
Secretary of Veterans Affairs

25 OCT 19

Date